(2)

89-476

No. - .

Supreme Court, U.S.
FILED
OCT 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1989

TOWN OF HULL MASSACHUSETTS,
E. RENO CONSTANTINEDES
NANCY BURNS, CLAUDETTE FITZSIMMONS,
AND MYRON KLAYMAN,
INDIVIDUALLY AND
IN THEIR OFFICIAL CAPACITIES AS SELECTMEN,
PETITIONERS

v.

DAVID B. MILLER, NANCY DUNN,
and RICHARD MUSMECI,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COUR OF APPEALS
FOR THE FIRST CIRCUIT

**Brief for the respondents
in opposition to petition
for certiorari**

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No.

IN THE
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October Term, 1989

TOWN OF HULL MASSACHUSETTS,
E. RENO CONSTANTINEDES
NANCY BURNS, CLAUDETTE FITZSIMMONS,
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individually and
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PETITIONERS

v.

DAVID B. MILLER, NANCY DUNN,
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RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION TO PETITION
FOR CERTIORARI**

The Respondents, who were plaintiffs and appellees in the courts below, respectfully request that this Court decline to issue a Petition for a writ of certiorari to review the judgment in this

case of the Court of Appeals for the First Circuit of June 21, 1989.

Constitutional and statutory provisions

In addition to the First Amendment to the United States Constitution and 42 U.S.C. sect. 1983 cited in the Petition, this case involves the following:

1. Article IX of the Massachusetts Declaration of Rights:

> Art IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

2. The Massachusetts Civil Rights Act, Mass. G.L. c. 12 sect. 11I:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his

> own name and on his own behalf, a civil action ...

3. Mass. G.L. c. 121B sect. 6, which states in relevant part:

> The ... board of selectmen ... may, after hearing, remove any such member [of a redevelopment authority] because of inefficiency, neglect of duty or misconduct in office ...

Statement of the case

The respondents suggest that the statement of facts in the Petition misconstrues the trial evidence. The petitioners refuse to present the facts in the light most favorable to the plaintiffs and refuse to acknowledge inferences favorable to the plaintiffs, as they are required to do in this appeal from the denial of their directed verdict motions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The respondents suggest the facts are correctly stated in the opinion of the

Court of Appeals located in the Petition at pages la-lla.

Reasons why the Petition should be denied.

I. THE REDEVELOPMENT AUTHORITY MEMBERS HAD A CLEAR FIRST AMENDMENT RIGHT TO SPEAK AND VOTE AS THEY FELT BEST. THEY WERE PUNISHED BECAUSE OF THEIR EXERCISE OF THAT RIGHT.

A. The Petition misstates the facts in an attempt to portray the petitioners' motivation as concern for municipal finance.

The plaintiffs were suspended from their elected offices because of their support for a subsidized elderly housing project in the Town of Hull, Massachusetts. The Petition attempts to categorize the redevelopment authority members' speeches, votes, writing and advocacy for this elderly housing project as unadorned "conduct" with no communicative content, outside the protection of the first amendment, conduct of a purely financial nature,

akin to signing a check. This contention is wrong factually and wrong legally.

The trial evidence showed a rancorous political dispute about whether the Hull Redevelopment Authority[1] should build a subsidized low-income elderly housing project or a luxury condominium complex and marina on a waterfront parcel in the town's redevelopment area. The plaintiff authority members supported the low-income elderly project. The defendant Selectmen opposed the elderly project and supported the luxury condominiums. The

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[1] Under Massachusetts law redevelopment authorities are bodies politic and corporate separate from municipal government. Mass. G.L. c. 121B sect. 4. In towns such as Hull, four of the five authority members are elected by the public, the fifth is appointed by the state. Mass. G.L. c. 121B sect. 5. Authorities are empowered to take property by eminent domain, to clear and improve property and to contract for construction on that property. Mass. G.L. c. 121B sect. 11.

decision, by law, was the authority's to make.

Both sides freely stated their points of view. The constitutional line was crossed when just days after learning that advertisements were to be placed for construction bids for the elderly project the Selectmen suspended from their elected offices the three redevelopment authority members who supported the project while declining to suspend the one elected redevelopment authority member who opposed the project. The Selectmen then appointed interim authority members, who cancelled the contract for the elderly housing project.

The petitioners recite at length their purported concern for the detrimental impact the elderly project would have on town finances (Petition p. 16-19) and attempt to frame their opposition to the project as having been solely on

financial grounds. They do this because they propose creating an anomaly exempting speech concerning public finances from first amendment protection.

This characterization of the defendants' concern as having been only about the cost of the elderly housing project is contrary to the evidence. The defendants themselves testified about their non-financial motives for opposing the subsidized housing project. Constantinedes, the chairman of the Board of Selectmen, testified he opposed the low-income housing project because he was worried that if not enough low income people from Hull moved into the project "low income people from outside of Hull" would move into the apartments. (RA 1331) (references to the Record Appendix in the Court of Appeals will be prefaced "RA"). He did not want poor families arriving from outside of town. (RA 1330-

1331). Hull is located near Boston. Another defendant, Klayman, preferred that the luxury condominiums, rather than the low-income elderly project be built on that site. (RA 1281). Defendants Burns and Fitzsimmons testified they opposed the subsidized housing project. (RA 1054, 1071, 1103). The jury could have inferred from Burns' and Fitzsimmons' intensive lobbying efforts in the state legislature for a casino gambling bill for the Town of Hull and their reliance in part on the problems of the redevelopment authority as a ground for passage of this bill that their opposition to the project was based on fear that any development in the redevelopment area could jeopardize passage of the gambling legislation. (Petition p. 4a-5a).

The Court of Appeals found, "The evidence supports the jury finding that

plaintiffs were removed for speaking out and voting for a project to which the Board [of Selectmen] was opposed. This was a violation of their first amendment rights. It was also a violation of the Massachusetts Civil Rights Act." (Petition at p. 21a).

The evidence explicitly supported the jury's conclusion that the Selectmen punished the redevelopment authority members because the Selectmen wanted to stop the subsidized housing project for political reasons, not because of concern for the town's finances. In fact, the elderly housing project would have been built entirely with private funds, with no money coming from either HUD or the Town of Hull.2

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2 The land was to be sold to the developer for $180,000. Payment was due April 1, 1982. The developer was to then own the property and the buidling he was required to construct.

The characterization in the Petition of the plaintiffs' conduct as simply rubber stamp financial action, not speech or expressive conduct, is factually wrong.

B. <u>The Selectmen punished the plaintiffs because of the content of the plaintiffs' speech</u>.

The chairman of the Hull Board of Selectmen ordered redevelopment authority members to vote "right now, tonight" (RA 1433) "to agree to amend the cooperation agreement[3] once and for all and limit the financial liability of the town" at a March 3, 1982 joint meeting of the Board

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[3] The "Cooperation Agreement" was the 1968 contract by the Town of Hull, the Hull Redevelopment Authority and the Department of Housing and Urban Development that established the conditions for federal financial support of the redevelopment authority. The agreement called for all town agencies to cooperate with the redevelopment authority in carrying out the redevelopment project. The agreement could only be amended with the consent of HUD. (Petition p. 4a).

of Selectmen and the Redevelopment Authority (RA 1433-1434). Two of the three redevelopment authority members present, on the advise of their attorney, refused to vote as ordered.4 They were immediately suspended from office and charged with inefficiency and neglect of duty. The third member present, Alibrandi, said "he'd do whatever Reno [Constantinedes, the Selectmen's chairman] wanted him to." (RA 479, 1269, 1971). No charges were brought against him. He was not suspended from office.

The defendant Selectmen admitted at trial that if the other authority members "had said the same words Alibrandi said" they would not have been charged or suspended. (RA 1437, 1316, 1314, 1271).

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4 Plaintiffs Miller and Dunn were present at the meeting. Plaintiff Musmeci, because of illness, could not attend the meeting. The third authority member present was Frederick Alibrandi.

No charge had anything to do with the refusal to amend the cooperation agreement. (Pet. p. 75a-81a).

A more direct, a more invidious violation of the right to freedom of expression is difficult to imagine. The jury agreed, answering "Yes" to the question, "Do you find that any of the defendants violated the rights of freedom of expression of the plaintiffs?" (RA 165). The First Circuit Court of Appeals unanimously agreed, saying, "Although we find no cases directly on point, probably because it is considered unassailable, we have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a

controversial public issue."5 (Petition p. 19a).

The Petition urges this Court to reject what the First Circuit deemed "unassailable" and adopt the position that "[s]uch conduct does not amount to protected First Amendment expression, as posited by the Court of Appeals. The

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5 The Court of Appeals found (Petition p. 20a) United States v. City of Yonkers, 856 F.2d 444, 457 (2d Cir. 1988), involving a refusal by city officials to vote to fund public housing as ordered by a federal court "obviously does not apply to the situation before us." The Yonkers case is pending before this Court on appeals by the individual city officials. Chema v. United States, No. 88-856 (and consolidated cases). The first amendment issue in Chema bears no relation to the present case. Chema involves the question of whether a federal court can require a vote to put into effect a consent decree. The present case questions whether one elected official can punish a fellow elected official because of the content of the fellow official's public statements and votes.

commitment of public finances is action, not speech."[6] (Petition at p. 20).

The defendants rely on no authority for the proposition that votes, speeches, public discussions, decisions and policy statements of elected officials about a matter of great public concern have no communicative content and thus are speech outside the protection of the First Amendment. Exactly the opposite is the case.

"Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process." Hutchinson v.

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[6] Because they reject the concept that the plaintiffs' support for the elderly housing project had any communicative content, the petitioners do not propose any sort of balancing test, strict scrutiny review, compelling state interest review or any of the free speech standards of review adopted by this Court.

Proxmire, 443 U.S. 111, 133 (1979).[7] "The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), is that 'debate on public issues should be uninhibited, robust, and wide-open.' We think the rationale of The New York Times case disposes of the claim that [the plaintiff legislator's] statements fell outside the range of constitutional protection." Bond v. Floyd, 385 U.S. 116, 135-136 (1966).

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[7] BLACK'S LAW DICTIONARY, Revised 4th Ed., 1968, p. 1748, defines "Vote" as follows: "The expression of his will, preference, or choice, formally manifested by a member of a legislative or deliberative body ..."

As to the Selectmen's suggestion that voting and advocacy by a legislator does not have First Amendment protection, the Supreme Court disposed of the identical claim in Bond, id., as follows:

> The State argues that the New York Times principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the New York Times case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.

The Selectmen's assertion that elected officials have no First Amendment protection for their votes is completely rejected by the Bond decision.

A recent unanimous decision by the United States Court of Appeals for the District of Columbia Circuit, relying primarily on the First Circuit's decision

in the present case, held that votes of a legislator "constitute 'speech' protected by the First Amendment." In Clarke v. United States of America, F.2d , 1989 U.S. App. LEXIS 14431, p. 3 (September 26, 1989) members of the District of Columbia City Council challenged the Armstrong Amendment, a federal law requiring them to enact an exemption to the District's anti-discrimination law to permit religious educational institutions to discriminate against persons condoning homosexual acts, with the threat of cutting off all funding for the District if the councilors refused.

City Council members asserted the federal legislation coerced them to vote in a specific manner, violating their First Amendment right to vote as they chose. The District Court agreed, granting summary judgment for the

plaintiffs. The Justice Department, similarly to the defendants in the present case, argued that voting is not "protected speech." The Court of Appeals completely rejected this assertion, saying, 1989 U.S. App. LEXIS 14431, p. 21,

> A legislator's vote is inherently expressive. This is so, moreover, not simply because the act of voting requires a verbal utterance. Voting, as the Supreme Court has recognized, is the "individual and collective expression of opinion[] within the legislative process." Hutchinson v. Proxmire, 443 U.S. 111, 133 (1978). It serves the function not only of mechanically disposing of proposed legislation, but of registering the "'will, preference, or choice'" of an individual legislator on an issue of concern to the political community. Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988) (quoting BLACK'S LAW DICTIONARY 1414 (5th ed. 1979)), cert. denied, 109 S. Ct. 3249 (1989). For this reason, a legislator's voting record is "the best indication of [his or her] position on specific issues and his or her ideological persuasions." M. Barone & G. Ujifusa, THE ALMANAC OF AMERICAN POLITICS 1988 xviii (1988); see also id. at xvi-xviii (identifying

and describing eleven ideological scales for rating congressional voting records).

The only other case that could be found in which a suggestion was made that the act of voting is not protected speech was Wrzeski v. City of Madison, Wis., 558 F. Supp. 664 (W.D. Wis. 1983), in which a city council member challenged a regulation requiring each councilor to vote either "aye" or "no" on every question before the council. The court found, "Plaintiff's status as a legislator does not strip her of any rights she would otherwise enjoy under the First Amendment to speak freely or not speak at all," noting that "[l]egislators enjoy the same First Amendment protections as any other members of our society." 558 F. Supp. at 667. The Court enjoined the enforcement of the regulation.

Voting requires "speech," even if that speech is merely saying "yes" or "no." To vote as the Selectmen demanded required one redevelopment authority member to propose the matter to be voted on and another to second it. This is as much pure speech as requiring the state motto to be displayed on a license plate, Wooley v. Maynard, 430 U.S. 705 (1977), or requiring another party's literature in a utility's billing envelope, Pacific Gas & Elect. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986).

Besides the spoken words, the very act of voting is expressive, certainly as expressive as burning an American flag, Texas v. Johnson, U.S. , 109 S.Ct. 2533, 2538-2540 (1989), or picketing, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 99 (1972), Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968), or

displaying a flag with a peace symbol attached, Spence v. Washington, 418 U.S. 405, 409-411 (1974), or wearing an armband, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969). The act of voting in favor of or in opposition to a specific matter of public concern explicitly conveys a particularized message of the legislator's opinion on that matter. Hutchinson v. Proxmire, supra.

The defendants refer to a line of cases dealing with discharges of public employees for the proposition that "official behavior" is not protected by the First Amendment. In fact, the cases hold just the opposite.8

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8 The defendants' similar reliance on the "political discharge" cases, Jiminez Fuentes v. Torres Gaztambide, 807 F.2d 236, 241-242 (1st. Cir. en banc 1986), etc., is, to be frank, bizarre. While "a certain amount of leeway" is needed in a representative

(continued...)

In Connick v. Myers, 461 U.S. 138 (1983), relied on by the defendants, the Court applied the standard established in Pickering v. Board of Education, 391 U.S. 563 (1968) and Perry v. Sindermann, 408 U.S. 593 (1972) to distinguish between "speech concerning public affairs" and speech dealing only with the internal business of the employee's public employment. Speech on public issues "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." Connick, 461 U.S. at 145 (citations

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[8](...continued)
government, permitting government leaders to consider party affiliation in the hiring of their own confidential policymaking assistants, Jiminez-Fuentes, 807 F.2d at 241, the removal from office of elected public officials by their political opponents because of their political beliefs is the quintessential act of a dictatorship, not of a representative government. This is not "leeway," but is running the ship of state on the rocks.

omitted). Only when an employee "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest" does the First Amendment not come into play when action is taken against the employee because of his speech. Connick, 461 U.S. at 147. See, Rankin v. McPherson, ___ U.S. ___, 107 S.Ct. 2891, 2902 (1987) (public employee's speech on a matter of public concern "lies at the heart of the First Amendment protection.")

The plaintiffs' statements and votes on the question of whether they should amend the cooperation agreement were quintessential "speech concerning public affairs." This was not private speech concerning only the agency's internal affairs. Their statements and votes favoring subsidized elderly housing were fundamental public discussions of government affairs. "Speech concerning

public affairs is more than self-expression; it is the essence of self-government. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

Just as their content-based discrimination was wrong so was the Selectmen's attempt to force the plaintiffs, on the threat of suspension from office, to vote in a specific manner. "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." Riley v. National Federation of the Blind of N.C., U.S. , 108 S.Ct. 2667, 2677 (1988) (emphasis by the Court).

The redevelopment authority members' advocacy and support for the elderly housing project was archetypal speech, explicitly and expressively communicating their views on a matter of public concern. They were punished because of

the content of that speech. Their first amendment rights were thus violated.

C. **The plaintiffs were punished for more than one specific vote. They were punished because of their continued support for the subsidized housing project.**

This case does not directly present the question of whether the act of voting constitutes protected speech. The plaintiffs' advocacy for the subsidized housing project involved years of public debate at redevelopment authority meetings, at town meetings, in the local press, and in the course of election campaigns, pervading their tenures on the redevelopment authority. The First Circuit Court of Appeals found the evidence supported the jury finding that the plaintiffs were removed from office because of their entire course of conduct in supporting the elderly housing project. (Petition 21a). Since this course of conduct included far more than

a single vote, even were the petitioners correct in their suggestion that the act of voting is not protected speech that contention would not require a reversal of the judgment.9

b. This is not the proper case in which to determine whether the individual defendants were entitled to qualified immunity.

The individual petitioners10 claim they were entitled to a qualified immunity from liability because in 1982 the law was not clear as to whether

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9 That the defendants were motivated by more than just the plaintiffs' votes (or refusal to vote) at the March 3, 1982 meeting is incontestable. The plaintiffs were first suspended from office on March 1, 1982, which suspensions were voided, then reimposed March 3. The plaintiff Musmeci was not present at the March 3, 1982 meeting, yet he, too, was suspended from elected office.

10 Only the individual defendants could be entitled to qualified immunity. Owen v. City of Independence, Mo., 445 U.S. 622, 100 S.Ct. 1398 (1980). The judgment is against both the town and the individual officials.

acting in bad faith to remove elected public officials from office because of their political views would violate their first amendment rights. This issue should not be reviewed in this case for a number of reasons.

First, as the Court of Appeals found, "there was firmly embedded in our constitutional fabric the principle that government employees could not be discharged for reasons that infringed on the employee's right of freedom of speech. See, Perry v. Sinderman, 408 U.S. 593, 597 (1972)." (Petition p. 22a). The First Circuit also noted that in Bond, supra., the Supreme Court "specifically rejected the argument that elected officials have lesser first amendment rights than ordinary citizens." (Petition p. 22a). The Supreme Court noted in Hutchinson v Proxmire, supra., in 1978 that voting constitutes a legislator's

"expression of opinion." Town counsel, who advised the Selectmen before the suspensions, testified he was well aware that the removal of elected officials would involve certain constitutional rights. (RA 1458-1460). The plaintiffs' free speech rights were clearly established at the time they were suspended from office.

Second, even were the plaintiffs' first amendment rights not clearly established at the time, the petitioners do not contest that the plaintiffs' procedural and substantive due process rights were clearly established. The jury found violations of those rights. The judgment as to those counts would stand even were this Court to reverse the Court of Appeals as to the petitioners' immunity on the first amendment count.

Third, the individual defendants would also remain liable under the state civil

rights act count for violation of the state constitution. Immunity under Massachusetts law is "limited to public officers acting in good faith, without malice and without corruption." Gildea v. Ellershaw, 298 N.E.2d 847, 859 (1973). The jury specifically found the defendants did not act in good faith. (Petition p. 43a).

II. THE DECISION BY THE REDEVELOPMENT AUTHORITY MEMBERS NOT TO EXHAUST THEIR STATE ADMINISTRATIVE AND JUDICIAL REMEDIES DOES NOT BAR ACTION IN FEDERAL COURT.

A. The petitioners could not have served as fact finders at a fair hearing to conclusively determine their own culpability.

The petitioners suggest that the administrative hearings at which they sat as prosecutors, judges and finders of fact, hearings concerned solely with the conduct of the plaintiffs and not at all with the conduct of the Selectmen themselves, were equivalent to a state

judicial proceeding entitled to full faith and credit in the federal courts. They suggest they themselves made a finding as to the constitutionality of their own conduct and that their own findings preclude federal court reconsideration of this issue. This suggestion is preposterous. As a matter of state law the Selectmen's hearings were not "judicial" proceedings.11 As a matter of state law the findings of these hearings are not preclusive as to the issues in this civil rights action. As a matter of fact the Selectmen never considered or made any findings on the constitutionality of their own conduct. As a matter of common sense even had the Selectmen ever considered the

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11 The removal of a redevelopment authority member "was the performance of an executive or administrative act rather than one of a judicial nature..." Collins v. Selectmen of Brookline, 91 N.E.2d 747, 749 (Mass. 1950).

constitutionality of their actions any findings of fact they made about their own conduct can not be considered "fair" as to the present plaintiffs.

Issue preclusion is grounded in the full faith and credit clause of the constitution and the federal full faith and credit statute, 28 U.S.C. sect. 1738, which provides in pertinent part that the "judicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state ... from which they are taken." McDonald v. City of West Branch, Mich., 466 U.S. 284, 287-288 (1984) (emphasis by the Court). The Court held in McDonald that a labor arbitration finding was not a "judicial proceeding" such as to bar a federal civil rights action. Similarly, the

removal hearings conducted by the Selectmen were not a "judicial proceeding," as a matter of state law.

The Petition accuses the plaintiffs of following a "dual strategy" of undertaking state process and then switching to the federal courts for relief. The plaintiffs did not undertake any state process. They were charged and suspended from office without notice, hearing or choice. The Selectmen convened themselves as a hearing board without the plaintiffs' consent or discretion. The plaintiffs had no choice as to state process.[12]

The petitioners' suggestion, boiled to its essentials, is that once the

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[12] Issue preclsuion is inappropriate "when the section 1983 claimant has not 'freely and without reservation submit(ted) his federal claims for decision by the state courts ... and then had them decided there ...'" Haring v. Prosise, 462 U.S. 306, 313 n. 7 (1983).

Selectmen themselves decided to charge and suspend the plaintiffs and to convene themselves as a hearing board, the plaintiffs were precluded from instituting a federal civil rights action until they had exhausted all their state court remedies.[13] The cry of "issue preclusion" by the petitioners is merely "exhaustion of state remedies" in sheep's clothing. It is axiomatic that exhaustion of state remedies is not required as a perquisite to federal civil rights suits. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 501-517 (1982).

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[13] It is questionable whether any realistic state court remedies were available. The hearings concluded March 12, 1983. (RA 255). Mrs. Dunn's and Mr. Musmeci's elective terms ended in early May 1983 (RA 121, 513), after which the question of their reinstatement would have been moot.

B. The petitioners fail to meet a single criteria for issue preclusion.

The defendants failed to make even a minimal showing of the requirements for issue preclusion to apply. Under the doctrine of issue preclusion, where a question of fact has been actually litigated and decided by a valid and final judgment the determination is ordinarily conclusive between the parties[14] in a subsequent action. Allen v. McCurry, 449 U.S. 90, 94 (1980).

1. Different issues were litigated.

Issue preclusion applies only to matters actually litigated and decided in a prior proceeding that were "essential" and "necessary" to that decision. Clarke-

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[14] The absurdity of the petitioners' contention is most apparent in the suggestion that at the hearings at which they sat as "neutral" judges and fact finders they were also interested "parties."

Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074, 1079 n.4 (D.C. Cir. 1987). The only purpose of the Selectmens' hearings was to determine if the members of the redevelopment authority were guilty of charges. The hearings did not address the only issue presented by the plaintiffs in this suit: whether the Selectmen violated the plaintiffs' constitutional rights. See, e.g. Carlisle v. Phoenix City Board of Education, 849 F.2d 1376, 1379-80 (11th Cir. 1988) (plaintiff school principal was not precluded from litigating whether she was transferred because of racial discrimination where state judicial proceeding addressed only whether she was transferred without cause); Barnes v. McDowell, 848 F.2d 725, 731 (6th Cir. 1988) (public employee was not precluded from litigating whether he was discharged for exercising his First Amendment rights

where state proceedings addressed only whether the discharge was justified because employee had engaged in sexual harassment); Hill v. Coca Cola Bottling Co. of New York, 786 F.2d 550, 554 (2nd Cir. 1986) (plaintiff was not precluded from litigating whether his termination was racially motivated where prior proceeding before state unemployment insurance board addressed only whether termination was with cause).

2. No issues were decided with respect to plaintiffs Miller and Musmeci.

Plaintiffs Miller and Musmeci resigned after three hearings. (RA 2566, 2567). The hearings continued against Mrs. Dunn alone. Because no issues were actually litigated and decided with respect to these two plaintiffs, issue preclusion can not apply to them. Neither a judgment nor a finding of fact was made as to

them. Haring v. Prosise, 462 U.S. at 316.

3. The hearings before the Board of Selectmen were without authority to decide issues raised in this suit.

The Selectmen not only failed to address the issues raised by the plaintiffs in this suit, they were without power to do so. The hearings were conducted under the guise of Mass. G.L. c. 121B, section 6. This statute empowers the Selectmen only to make or receive charges against the redevelopment authority members. It does not empower the Selectmen to hear charges made against themselves. The Board's hearings can not give rise to issue preclusion as to the claims made by the plaintiffs in this action. Heath v. John Morrell & Company, 768 F.2d 245, 248 (8th Cir. 1985) (Issues decided by a state agency outside the scope of that agency's

authority can not give rise to collateral estoppel).

4. The plaintiffs did not receive a full and fair opportunity to litigate the issues at the hearings.

Issue preclusion will not apply where the parties did not have a "full and fair opportunity" to litigate an issue. Allen v. McCurry, 449 U.S. at 95. Where the prior proceedings are non-judicial, collateral estoppel will not attach unless the body conducting the inquiry was acting in a judicial capacity to resolve disputed issues of fact properly before it which the parties had an adequate opportunity to litigate. United States v. Utah Construction and Mining Co., 384 U.S. 394, 422 (1966). That was clearly not the situation at the Selectmen's hearings.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY EXCLUDING THE SELECTMEN'S FINAL WRITTEN DECISION.

The defendants suggest the trial judge improperly excluded the Selectmen's 96-page written findings on the charges against Mrs. Dunn. This decision was proper. It certainly was not reversible error. Admission or exclusion of evidence is committed to the discretion of the trial court. This is typical of a run of the mill discretionary evidentiary decision by a trial judge and need not be reviewed by this Court.

The Court of Appeals noted that the trial court "carefully weighed the probity of the evidence against its prejudicial and cumulative effects. It considered the efficacy of a limiting instruction. The defendants were allowed to put before the jury, via testimony, the information contained in the Board's

final decision." (emphasis added) (Petition p. 11a-12a).

The trial judge considered admitting the evidence subject to a limiting instruction but noted "there is a point in which it is so overwhelming that a limiting instruction doesn't help." (RA 1785, 1788). The judge said, "I want to be very sensitive about making the balance that's required when a document made outside of court can be introduced for the truth of what's asserted. And I've got to make the balance between what is so prejudicial that it may outweigh its probative value." (RA 1786).

Even if the trial court exceeded its discretion this Court should not review such a common evidentiary matter, dependent entirely on the facts of this one case. This is particularly so in the present case where the document at issue merely corroborated days of testimony and

was not even offered substantively. The document was relevant to only one of the three plaintiffs, Mrs. Dunn, and only two of the four individual defendants. (RA 1781, 1784). It was not offered for the truth of its contents, but merely to show the defendants' good faith. (RA 1789).

It is inconceivable that reading this document, rather than hearing its contents, would have affected the outcome of the trial.

IV. THE JUDGMENT WAS SUPPORTED BY OTHER GROUNDS NOT CONTESTED BY THE PETITIONERS.

The complaint, (Petition p. 44a-54a), as it went to the jury, contained three counts alleging violations of the plaintiffs' federal constitutional rights to freedom of expression (Count One), to procedural due process (Count Two), and to substantive due process (Count Three), and one count under the Massachusetts civil rights act, Mass. G.L. c. 12 sect.

III, for violation of the right to hold elected office as protected by both the Massachusetts Declaration of Rights and the United States Constitution (Count Five).15

The petitioners contest only the verdict as to Count One, the free speech claim. Even were this Court to grant the Petition and reverse the judgment as to this count, the verdict as to the remaining procedural and substantive due process claims and the state civil rights act claims would stand and would provide adequate independent support for the judgment. For this reason the Petition should be denied.

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15 The jury found for the defendants on Count Six, which alleged a state tort claim for intentional infliction of emotional distress. The trial judge, by stipulation, directed a verdict on Count Five.

V. THE PETITIONERS' CONDUCT IN SUSPENDING THE PLAINTIFFS FROM THEIR ELECTED OFFICES WAS IMPROPER AS A MATTER OF STATE LAW.

A. The jury found the defendants violated the plaintiffs' right to hold public office as protected by the Massachusetts Declaration of Rights.

The jury verdict is supported by an adequate independent state ground, a violation of the plaintiffs' rights to hold elected office as protected by Article IX of the Massachusetts Declaration of Rights.16

The Massachusetts Civil Rights Act, Mass. G. L. c. 12, sect. 11I, creates a private cause of action for violation by means of threats, intimidation or coercion of any right protected by, among other laws, the Massachusetts Declaration

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16 Art IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

of Rights. Count Five of the complaint stated a claim under the Massachusetts Civil Rights Act for deprivation of rights protected by Article IX. (Petition p. 53a). The jury specifically found the defendants "acted by threat, intimidation, or coercion so as to violate the rights of plaintiffs to hold public office as provided by the Massachusetts Constitution." (Petition 10a). This finding is wholly a matter of state law and should not be reviewed by this Court.

B. The petitioners' conduct was improper even under the state statute authorizing the suspension of elected officials.

The Selectmen acted under authority of Mass. G.L. c. 121B, sect. 6, which authorizes suspension and removal of a member of a redevelopment authority for inefficiency, neglect of duty or misconduct in office. The Massachusetts

Supreme Judicial Court has interpreted this statute to require a finding of an intentional violation of a known and significant rule or duty inherent in the obligations of office. "Otherwise stated, the rule or duty must be important enough so that its breach renders the officer unfit to continue to hold office." Bunte v. Mayor of Boston, 278 N.E.2d 709, 713 (Mass. 1972) "Errors of judgment cannot be construed as misconduct in office." Id. at 714.

Each defendant testified he or she was aware of this statute and was aware of the Bunte decision by the state's highest court. Each defendant testified he and she suspended the plaintiffs because of their errors in judgment. Each defendant testified he and she never felt the plaintiffs were unfit to continue to hold their elected offices.

Rather than scrupulously following the state statute, as the Petition suggests (Petition at p. 22) the Selectmen knowingly and intentionally conducted sham proceedings out of purely political motives. Their conduct was insupportable as a matter of state law and need not be reviewed by this Court.

CONCLUSION

For all the above reasons the Petition for a writ of certiorari should be denied.

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